IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

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| WSOU INVESTMENTS LLC | * | October 21, 2020 |
| | * | |
| VS. | * | CIVIL ACTION NOS. |
| | * | |
| DELL TECHNOLOGIES INC. ET AL | * | W-20-CV-473 thru 482, 485, 486 |

BEFORE THE HONORABLE ALAN D ALBRIGHT
TELEPHONIC SCHEDULING CONFERENCE

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(October 21, 2020, 1:31 p.m.)

MS. WALLACE: Court calls Waco Case 20-CV-473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 485 and 486, WSOU Investments versus Dell Technologies Inc., et al for scheduling conference.

THE COURT: If I could hear announcements from counsel, please.

MR. SIEGMUND: Good afternoon, Your Honor. This is Mark Siegmund for plaintiff WSOU, and with me today I have Mr. Jim Etheridge from the Etheridge Law Group, Ryan Loveless and Travis Richins all from the Etheridge Law Group.

THE COURT: And who will be speaking?

MR. SIEGMUND: Myself and Jim, Your Honor.

THE COURT: Okay. Good to hear from you.

And for defendants?

MR. SHELTON: Good afternoon, Your Honor. This is Barry Shelton of Shelton Coburn LLP. Today we have two client representatives. First is David Kuznick from Dell Technologies and Danielle Coleman from VMware, and speaking today for the defendants will be Brian Rosenthal from Gibson Dunn, and also here today is Benjamin Hershkowitz from Gibson Dunn.

THE COURT: Very good. Well, I always try to welcome folks who are either in-house or clients who have taken the time to attend. I very much appreciate it.

So I'm happy to take up whatever the issues are.

01:32 MR. ETHERIDGE: Well, Your Honor, this is Jim Etheridge speaking for WSOU. Maybe the first one to take up is a fairly easy one. It relates to foreign discovery. You might remember we had a pretty thorough discussion of this at our CMC with Huawei on Friday, and the result from the Court was that we would go ahead and start foreign discovery with regard to inventors and the entities and that the process could start, although discovery wouldn't start till after the Markman. After that call we had a meet and confer with Mr. Shelton who was also on that CMC and inquired if we took the same position, and we told them that we do. We're fine with that. After that -- afterwards we got more correspondence from him basically really extending the reach and the scope of that discovery in addition to just the inventors and the entities through which the -- you know, the patents had passed, wanted discovery of inventors from other patents that are not in this suit. Dell's position is that that's relevant because they were incorporated by reference. He wants discovery of any foreign firms whose name appears in any of the prosecution that would be foreign law firms. He goes deeper and asks for discovery of any prosecuting attorneys whose names appear in any of the prosecution file references and then also discovery of any person that's signed a document in the chain of title, and that's again separate from, you know, discovery on the entity, and then finally discovery of all entity names that

appear anywhere in the chain of title even if they're not the signatory parties.

So we stand by the decision last week of the Court that I think it's fine to start discovery with regard to inventors and the actual entities who had an ownership in the patents as they were transferred. Our concerns are with this broad ranging discovery is it's just not proportional to the needs of the case, and subpoenaing law firms and lawyers probably is going to not result in very much and probably are going to be picking up work product and privilege objections and taking up the time of the Court prior to the Markman.

And also just having looked back at what the Court has permitted before, you know, discovery's always been somewhat limited. So I just kind of remind you of the analogy, if you give a mouse a cookie, then, you know, they continue to ask for more and more. It just doesn't seem like there's much to be found from trying to depose a person who signed a document in the chain of title because that person might have some information about the licensing of the patents when none of that evidence exists, and it seems like a fishing expedition. So I would suggest we have the same scope and range that we concluded that the Court permitted in Huawei and that we stop it there before the discovery gets incredibly expansive.

THE COURT: I'll hear from defendants.

MR. ROSENTHAL: Your Honor, it's Brian Rosenthal. Thank

you. Good to talk to you today.

Yes. So just factually I don't think it makes much of a difference, but we didn't start with a request for assignees and inventors and then once we got that, asked for more. That's not at all what happened. We sent two or three weeks ago a list of all of the foreign discovery that we wanted to pursue in this case. And that included assignees, inventors, and it included both that have prosecuted the patents and it included some of the other categories that are -- that Jim just mentioned a moment ago.

We've always from the beginning of that correspondence sought all of that. What happened on Monday when we had our meet and confer is that we said, look. We understand that the Court ruled on Friday that foreign discovery can proceed as far as the procedures can be begun as long as the discovery itself does not take place until after the Markman hearing, and so we assume that you all are okay and that we can proceed on that basis. And the response that we got was, well, we're okay with that with respect to the assignees and the inventors. We're not okay with that with respect to the other categories. We did not understand that there was any sort of discussion of the metes and bounds of what would and would not be included in the foreign discovery on Friday's hearing in the Huawei case. Mr. Shelton was on that call. I was not. But we understood that the question was one about timing. Foreign discovery requests,

can they be in fact begun at this point as long as the discovery itself does not take place until after the Markman hearing. So I don't see any reasonable distinction or any meaningful distinction between foreign discovery that we need to take. That takes a long time. It's a lot of countries we've got to go to. Whether that discovery is of an assignee or whether that discovery is of, you know, a former assignee, one of the companies in the chain. So from a timing perspective, our understanding is the whole point of this is foreign discovery takes a long time. If we wait until May to start those requests, there's no chance that we're going to get that information in time to use it for the trial. And that's the reason to start it now.

With respect to the categories of information that we're looking for, you know, the fact that there are a lot of different categories of the product of a fact that we've got 12 cases here, each of which are totally different patents in totally different families, most of the time came from totally different companies that were acquired by various Alcatel companies, there's all kinds of different history. This is not a straightforward situation where you got two or three patents that were, you know, developed out of an R&D department in France and we're just looking to get some information from the companies from which the development occurred, that's not this case. This case is -- and these cases have to do with lots of

different companies that reside in lots of different places around the world, and these patents have moved around and moved around several times, and so they were -- you know, Nokia was a former owner of some of these patents. There were assignments that were granted. There were sales that were granted. Each and every one of those transactions has possibilities of having very important information. I can't tell you with certainty what each of those transactions will yield as far as information, but I think that it's certainly reasonable that we be permitted to pursue what those transactions look like and what went into them. That's the purpose of our discovery with respect to the former assignee. The prosecuting attorneys is a similar situation. We've got lots of different folks that were involved in the prosecution. And so we're interested in taking discovery from those folks. And then the inventors, there are -- there's a patent that incorporates what the '888 patent, which is one of the 12 cases, incorporates by reference another patent, and that patent has a number of inventors, and those inventors clearly invented subject matter very, very similar to that which is disclosed and claimed in the '888 patent. And so it is absolutely targeted. We're not taking discovery or seeking to take discovery of every inventor of every patent that's incorporated by reference by any means. It's one very narrow focused set of inventors that we believe that discovery is likely to yield something important here. And so from our

perspective, it's reasonable, it's targeted, it's related to the lawsuit, and what we are asking for is just the ability to start that process now rather than waiting until May.

THE COURT: Anyone else for any of the defendants?

MR. ROSENTHAL: I'm certainly happy to have anybody else speak, but I intended to speak on behalf of both VMware and Dell.

THE COURT: Okay. Very good.

I'll hear from -- any response from the plaintiff, and including in that response, if I could hear an explanation or representation of how the additional efforts, if any, by the defendants to get this stuff started will cause additional burden on behalf of the plaintiff at this time that wouldn't be fair.

MR. ETHERIDGE: Well, a couple of things, Your Honor. One, again, we're not arguing about the inventors. Quite a bit of time that Mr. Rosenthal just spent was talking about inventors. That's a given. And also entities that actually own the patents. We're talking about is every single prosecuting attorney whose name happens to appear on a prosecution, and that is also discovery from persons that just sign a document in the chain of title separate from the actual entity. And then the last one is just discovery from entity names that happen to appear in the chain of title that aren't even signatories. So I guess what I'm saying is I think as

this stuff comes up, we're going to get into discovery disputes pre-Markman. A lot of this stuff is going to be privileged, attorney work product --

(Clarification by the reporter.)

MR. ETHERIDGE: I think we're going to get into taking up the Court's time with motions to quash and disputes about whether or not something is attorney/client privilege from a prosecuting attorney, and I don't think we need to get into those issues until after Markman.

THE COURT: Well, I don't think -- and maybe I'm missing it. I'm just being dense maybe. I don't think the defendants are asking to take any of this discovery now. They're simply trying to get it arranged so that it may commence as quickly as possible. And if I'm misunderstanding it, please let me know.

MR. ETHERIDGE: Well, a great part of this discovery is in Canada. I've never had any problem getting discovery in Canada, and I guess the practical question is, let's say that you -- the right to a particular prosecuting firm who's willing to send them something, are we then putting our hand up and saying that's okay. Don't send it until after Markman? What's going to stop these people from engaging in letter writing back and forth and we will get into discovery de facto, and the only reason this is happening because of kind of the foreign exception that you have in your court, and I understand that and we understood your struggles with, you know, Chinese source

code and such, but that's just not the situation here. And I guess I'm seeking a little bit more understanding of what that means there will be no discovery until after Markman. This is just writing a letter or a subpoena to somebody in Canada. Will they be informed -- must they be informed, you do not have to comply with this until after Markman, or how does that process -- I don't understand how you -- how we say the process starts now, but there is no discovery until after Markman.

MR. ROSENTHAL: Your Honor, may I address that? It's Brian Rosenthal.

THE COURT: Of course.

MR. ROSENTHAL: I think it's the same answer to that question as is the answer with respect to assignees and inventors. We're talking about a process question here. And the process is the same, and we're not just dealing with Canada. We're dealing with the Netherlands and Germany and Finland, France. There's a lot of different countries. These patents came from a lot of different places.

But as far as what is a mechanism that we use to ensure that the discovery is not taken in advance, that's just communication. And, by the way, Canada is not quick right now. We understand from other matters that things are moving very slowly due to COVID. And I don't expect that that's going to be an easy process. But the simple answer, we'll just tell every one of these folks, including the inventors and the

assignees and these other categories of people that have relevant information that we would like for them to produce the requested information after April 29th or after April 30th.

THE COURT: Let me interrupt for a second. So it seems to me that plaintiff has two choices here. And I may be deferential to them with what -- so it seems to me that probably what the plaintiff cares a great deal about is me setting these cases for trial and keeping them on track to get them tried. And my sense is that what the defendants are attempting to do is to get things lined up so that when Markman takes place and the balloons go up and discovery can commence, it can commence quickly. It seems to me that if I restrict what the defendants want to do in terms of what I'll call that preliminary gating or preparing for discovery to commence quickly, it seems to me that if the plaintiffs want me to have the defendants hold off on that, then the risk should be that if we delay doing that and we then encounter problems -- the defendants encounter problems getting discovery that I were to determine they're entitled to that that would -- that might require me to extend the period of discovery and push back the trial. So when I say I want to be somewhat deferential to the plaintiff here, I don't mean to sound biased. I try and keep everything as even as possible, but it seems to me -- it seems to me -- well, it absolutely is correct that defendants are going to be allowed to do discovery that I think is

appropriate, and I will tell you that it sounded to me like there was some of the discovery that they're seeking -- the defendants are seeking that might not require a witness. I mean, there might be more efficient ways of doing it, but, you know, I don't know that we have any way of knowing that. I can tell you on the record that I have personally on this side of the bench encountered issues specifically as -- I think it was Mr. Rosenthal said specifically with -- dealing with witnesses from Canada. That really is a problem. It's a problem for Americans to be allowed to go there. It's a problem for them to be allowed to come here. So let me turn this over to -- let me -- I do -- it did sound to me like there was a lot of discovery there that might be done more efficiently but that we don't know at this time whether that will be possible or not. So let me hear from the plaintiff with respect to -- I will give you some of the reigns at this time about how you want me to restrict what the defendants are allowed to do with the understanding that if -- if we -- if I don't allow them to do it now and they need to do the discovery later and it will take them longer to do it than what we'd originally envisioned under the discovery order, then that's when we might take care of it. So what are your thoughts on that?

MR. ETHERIDGE: Well, a couple of things there, and you're right. We do not want to delay the trial. But a couple of thoughts there, and I had brought it up before. For example,

if they send a -- let's think about the mechanics there. If they send us to Fina to a firm who says, fine. We'll comply. We're going to send you all our files. What's the mechanics that we have at that point? Do we -- how do we object? Do we file motions to -- I mean, do we file motions to quash and -- and if we even know about the correspondence, right? I had brought that up last week. Our experience in the past is it's very important -- this is about obtaining discovery that's going to be in the case and both sides should do that. We should not be forced to run this -- to issue the same subpoenas ourselves, and -- and I -- so that we know what it is that's going to be produced and when. I guess part of that could be that maybe we -- it's teed up and it's ready to go, but we know what those things are and then we be given, say, a two- or three-week period after Markman to file our objections, our motions to quash. Something like that would put it on -- square on the footing of the other -- that would put it square on the footing of the other domestic discovery if you want to call it that. Otherwise, I'm just concerned that some of these -- some of this information might get turned over and we have to deal with it. I mean, my understanding of no discovery had to do with not entangling the parties in unnecessary costs and delay prior to the Markman. And it seems like we've just kind of stepped right back in it here. And I'm just looking for what the mechanics are and not wanting to take up the

Court's time over discovery disputes before they need to be. I guess if you say that you're giving us the reigns, maybe what the answer there is that it's made clear in these subpoenas that discovery -- that the production is not to happen until two to three weeks after Markman, and that gives us an opportunity to object and that also we're just copied on the correspondence so we know what it is that's going to be produced. Or else we would have to file motions to quash on many, many subpoenas just being overbroad, but if we knew what it was that was going to be produced, we can meet and confer and narrow it and get an understanding of what that is. That's some of the ideas. I'm trying to work through the mechanics.

THE COURT: Is it something that you think -- and I'll ask both sides this. It sounds to me like that's something maybe you could sit down and come to an agreement with defense counsel as to how they will react in those situations, and it seems to me that if, for example, the -- well, let me hear from Mr. Rosenthal. My sense of what you're sending out is a subpoena now, but I guess the plaintiff is correct that if you send out -- I'm making up a number, a hundred subpoenas that unless he cross-subpoenas immediately or unless he objects immediately, then he might have waived his right to do so, and I -- and I will tell you that that is one of the things that I do try to avoid in discovery taking place before the Markman. I'm very sympathetic to the defendants' concern about getting

the discovery it needs from foreign folks, but I don't want that kind of preliminary getting ready to go to eat up the rule and to require the plaintiff to spend as much time on this discovery now as they would if it happened later. Mr. Rosenthal, do you have a resolution for that?

MR. ROSENTHAL: Yes, Your Honor. I think that -- first of all, I think that the parties can work this out. I mean, we have a very simple goal, but it's not at all intentioned with the goals of the rule or the goals that Mr. Etheridge talked about. Our goal is that we don't get stuck trying to take what we think is relevant, important discovery from foreign sources with not enough time to do it. And our goal is advanced by allowing us to proceed now with the preliminary steps that need to be taken in order for that discovery to have a chance of coming in during the discovery window. We are absolutely fine setting a date for production of any information, witnesses, documents for sometime after the hearing, and if it helps to have a buffer --

(Clarification by the reporter.)

MR. ROSENTHAL: We are very happy and only anticipated setting a date for production of any information, whether it's documents or witnesses, for after the Markman hearing, and we're happy to build in a buffer of a week or two or whatever it is that we agree with plaintiffs is appropriate so that they have an opportunity, and we also agree that their failure to

raise any motion practice or objections prior to the Markman hearing will not constitute a waiver for those objections as long as they're made promptly thereafter and we can set some kind of a time line so that there's no surprises.

So I actually think that that's a fine solution. It gives us what we need, which is the runway that is necessary, as everyone knows, to get discovery from foreign sources. And it serves the goal of not burdening the Court and the parties with discovery disputes before the Markman hearing. We never anticipated that we would be doing that. Our goal is simply to get the process started as it would be with assignees and inventors with respect to these other areas.

THE COURT: Let me hear from plaintiff's counsel. What -- assuming we build a buffer in here that would allow you to both cross-subpoena, if you decided to wait until after the Markman and to file your objections, does that satisfy you?

MR. ETHERIDGE: Yeah. It does. And there's actually more than just the parties, right, involved here. There's these third parties. For example, if a law firm or a lawyer, because they're actually talking about subpoenaing individuals, is subpoenaed and he believes his information's attorney/client privilege, you know, what's the mechanism for him to object or file his motion to quash? And I think what we'd have to do is in all the notices to these people to tell them that they have until whatever the date of the Markman is but some time period

after that to file their motions and that we anticipate production being made, you know, whatever it is, 21 days after that. I think that that would probably work, and then we -- we'd just need to make sure that we're copied on the communications so that we know who -- and I don't just mean the subpoena because often what we've seen before is there's a whole litany of communications back and forth narrowing the scope, saying, produce this, don't produce that, and then when we get the production, we have no idea. Is this totally responsive to the subpoena, or is this something that was negotiated? And historically we've had to move to compel those communications and they have been compelled. Often they come -- to your point, they come late in the game and they can cause delay because things are missing, but I do think we can work with them on these dates. It sounds like they're willing to do that and happy to give that a shot together.

THE COURT: Well, I feel a little bit like Dr. Phil. We've gotten together and we talked this through and we all feel warm towards each other and we'll be able to make this work. So I'll tell you what. Why don't we break now? You all -- while we're in a happy mood -- and see if you all can come up with sort of a structure for all that to take place. Again, if you can't, if you come across something that you both think it's willing to, you know, go up the hill and die for because it's to support your client, then I am sympathetic to

that. I had clients for a lot of years and I'll be happy to reset the hearing on very short notice because it won't last very long. But you all get together. I think my general thoughts are I definitely want to give the defendant every opportunity now to contact the folks that they need to contact and essentially allow those people to know that discovery is going to be initiated. That being said, I don't want -- I don't want either party to be over burdened by actually conducting discovery during the phase that I think should be dedicated to handling the Markman issues. But I'm always going -- to be clear, I think I've got lawyers on both sides of this case who know me intimately. I am always available to try and resolve any differences that you all might have and, you know, to make this work out, but that's for both sides. I think it certainly works well to let -- I'll make up a name. You know, it could be -- I'll just make up a name -- Microsoft Japan. If -- you know, let them know now what's coming. That will give them an opportunity to get any concern they might have about any attorney/client issues squared away. I'll allow the plaintiff to decide after the Markman which folks he wants to cross-subpoena, but I can't imagine there would be so much stuff the plaintiff would want that it would overly burden any third party. My guess would be it might just be filling in a couple things and at least be -- in fact, let me add one thing I think the defendants ought to put in whatever they send,

which is that after May or whatever the date is you all decide the exact date, you might let them know that they might be getting a cross-subpoena that will ask them for some additional documents, not many, that will probably be relevant to issues that are involved in this litigation. That way --

MR. ROSENTHAL: Makes sense to us, Your Honor.

THE COURT: And so does that work at least for the moment for everyone and with the understanding that if after you talk you're absolutely welcome to let me know that there are some issues you need to work out and we'll -- I'll keep massaging this until we get it done?

MR. ETHERIDGE: That works for plaintiff, Your Honor.

MR. ROSENTHAL: And for defendants. Thank you, Your Honor.

THE COURT: There you go. Another successful therapy session in a half hour. So if only I could charge what Dr. Phil charges.

So I hope you all have a wonderful day. Be safe out there.

MR. SIEGMUND: Judge Albright.

THE COURT: Yes, sir.

MR. SIEGMUND: This is Mark Siegmund. Not to break up the happy Dr. Phil session, but I think we might have had one more I think a relatively smaller issue to bring up with you if that's okay.

THE COURT: That will break up the Dr. Phil session, but I guess we've got to go ahead and take it anyway.

MR. SIEGMUND: Yes, sir, Your Honor. So I believe Mr. Shelton brought this up in an e-mail to Hannah I think he sent yesterday about whether there are deficient amended -- we filed an amended complaint, and there are currently a -- there was a pending motion to dismiss in each of the filed cases. We filed an amended complaint I believe this past Monday. So we believe that the amended complaints are moot, and I cited the Court some case law in the e-mail I sent earlier, and if you want, I can share that with you, but I think Your Honor's aware of that. And so we think that this issue really is not even ripe to bring up to your attention. We haven't met and conferred on Dell's allegations of our deficient amended complaints. We haven't really met and conferred with them at all about that particular issue. So we don't really think it's ripe for the Court's review right now, but I wanted to bring that to your attention in case you wanted to take that up right now.

THE COURT: Mr. Shelton, have you filed a motion to dismiss with respect to the amended complaints?

MR. SHELTON: Your Honor, this is Barry Shelton. Not yet. We will be amending the motions that had been filed before and refiling. And the issue that we wanted to bring to the Court's attention or make a request is that the Court set an expedited motion hearing on these motions to dismiss. I think the Court

probably remembers vividly the -- I believe it was the first time that you set I think eight cases or so, eight different cases that had pending motions to dismiss on January 31st. Let's just call that the De La Vega hearing. And that will go down in infamy in the Western District. And the reason why we wanted to bring this up is that the motions to dismiss, all 12 of them that were filed in these cases, really are of the same merit in strength as the motion that was filed in the De La Vega case by Microsoft. And I think it was quite beneficial that Your Honor held, you know, a fairly early hearing on not just that -- that motion but the other I think it was seven cases back in January and we wanted to make that same request here. I know from my other cases that the Court has a growing stock of pending motions to dismiss, and we think that these cases would benefit greatly from the Court's expediting a motion hearing, and then that's all that we wanted to bring up.

THE COURT: When you bring up the De La Vega case, is the concern writ large of your motions to dismiss that the plaintiff has not adequately tracked the claim elements as they did -- they failed to in that case in their pleading -- in their complaint and it's something you can specifically identify what's missing? Is it that type of motion?

MR. ROSENTHAL: Your Honor, it's Brian Rosenthal. Perhaps I can speak to that. The answer is yes. It's more than a technical failing, and I don't want to argue the motion, but

the basic premise of the motion, there's -- the motions deal with both direct infringement allegations and indirect. The indirect allegations, they're just missing, you know, presuit knowledge. But with respect to the direct allegations, it is exactly that. The complaints, not all of them, but the ones that we moved on that issue, the complaints are just missing any allegation that in any way matches up with some of the key limitations. And we pointed this out to the plaintiff in a letter and we pointed it out in our original motion to dismiss on these patents, and then the amended complaints just changed a couple of words here or there or added a -- you know, a website printout but by and large didn't address that issue at all. And so these are motions in which there are elements that are simply totally missing from any evidence and in many cases the evidence that they do cite that they do rely on states even sometimes in the quotation that it doesn't do it in the manner claimed. So it's those sorts of arguments that are raised by these motions.

THE COURT: And when do you -- Mr. Shelton or Mr. Rosenthal, when do you intend -- when do you anticipate filing the motion to dismiss by?

MR. ROSENTHAL: So this is Brian Rosenthal again. I expect the amended complaints were filed on Monday. I think we technically have two weeks, but I expect we'll be filing them next week. They're going to be very similar to the original

motions. Obviously we have to take into account the couple of small changes that were made.

THE COURT: So -- oh, if someone's going to speak, please go ahead.

MR. SIEGMUND: Your Honor, I was just going to say I think they pretty much came out and said that their original motions are moot, and we are happy to respond and have a hearing on this issue. We just haven't had a chance to digest the letters that they sent to us. Like I said, they did file -- they did send us original letter on September 30th which led us to actually file our amended complaint. We disagree obviously that there were any issues, but we went ahead and took the conservative approach, amended our complaint. They sent us two new letters last night after working hours and this morning. So we really haven't had any time to digest those particular letters or any of those issues. So we think that their current motions are moot, and like -- it sounds like they are going to refile a motion to dismiss, and that's fine, and we'll respond in time, and then if the Court deems that a hearing's necessary, we obviously are more than happy to take that up, but I don't -- I don't think that this is a De La Vega issue because I was also a little bit involved in that as well, and I don't think these complaints are anywhere near the disaster that I think we can all agree that the De La Vega issue brought up.

THE COURT: Well, it wasn't a disaster for the defendants in that case.

(Laughter.)

MR. SHELTON: It was not, Your Honor.

MR. SIEGMUND: It was not. That is true, Your Honor.

THE COURT: Well, here's where I'm at. I think y'all are missing each other a little bit in that if the question is do I find that the motions to dismiss -- current motions to dismiss are moot, the answer is -- if the plaintiff has filed amended complaints, then yes. I'm not going to take the time -- I will tell you now they're all denied. I'm not going to take up motions on -- in a complaint that is no longer the live complaint. However, I appreciate being alerted to the fact that there may be a motion to dismiss that is a gating motion. So I will put the burden on Mr. Shelton, and when the case is ripe, meaning all the back and forth between the parties has taken place, if you'll just let whoever it is that's handling this case, you know, know, we'll set it for a hearing relatively quickly, and by relatively quickly I mean within a couple of weeks, and I'll take it up and I will resolve it. So good heads up. I'm going to find that -- I'm going to find the current motions to dismiss are moot, but I'm also denying them without prejudice to the refiling of new motions to dismiss.

Is there anything else we need to take up?

MR. ROSENTHAL: Your Honor, I'm sorry. Your Honor, it's

Brian Rosenthal. That makes sense. I only have just a housekeeping issue to raise which is more by way of question and a little bit informative. I think the parties are zeroing in on a way to handle these 12 cases by grouping them into buckets which I understand is similar to how it's been done in some of the other cases by plaintiff. So I'm fully optimistic that we're going to get agreement on what those buckets will look like and we'll have those for Your Honor in the scheduling order that we propose.

The question that I have is on the scheduling order itself, I assume that what you're interested in is a proposed schedule that goes through Markman and that you'll deal with scheduling the rest of the case at that time, but just wanted to get clarity on that because I know that -- I certainly understand from some past cases that that's what you're looking for but just wanted to get some clarity.

THE COURT: Well, my recollection, and, you know, maybe Mark Siegmund can correct me as a former clerk or Barry Shelton can because he has so many cases or maybe I'll go grab Josh, but my recollection is that we -- for Markman purposes we tend to do all the patents at once. Did I say something different in this case that we were going to split them up? I may have. I just don't remember.

MR. SIEGMUND: Your Honor, in this case because there are so many, we actually have two days for Markman and hence why

we're breaking them into buckets. So, for example, if we're going to take Bucket 1 on Day Morning 1, we can do that. That was our plan for you.

THE COURT: But I was assuming the two days would be -- I mean, I knew that we had set aside two days. Did we decide that it was best to have a Friday for Bucket 1 or six and then wait and give more time for the second ones, or were we planning to do them -- all of them but it was to be over two days? I can't remember.

MR. SIEGMUND: Your Honor -- I'm sorry if I'm interrupting somebody.

(Simultaneous conversation.)

MR. ETHERIDGE: I just checked. Those dates are April 29th and April 30th. So they're on a Thursday, Friday. And what remains is the Court has reserved those dates for us, and what remains is for the parties to decide the best way to present the issues to the Court and you can either call them buckets. I prefer -- I always think of bad things in buckets so I just prefer groupings. But that is the plan that we're working on.

I guess I don't see there's any reason to stop at the Markman. I think the Court will issue a trial date. I think we should do the rest of the schedule. If something comes up that requires that to be modified, the parties are free to ask the Court to modify them.

02:12 THE COURT: Well, let me make clear. It is very unlikely -- this is the reason I asked the last question. It is very unlikely we would go to trial on 12 patents. I -- you know, for example, I've got VLSI versus Intel which had a bunch of patents and we've broken that up at the insistence of the plaintiff into three, even though I would have probably been happy with just two trials, but unlikely we'll do 12 patents in one trial. That will probably be at least two trials. And that's probably another reason for breaking them up into buckets or groups. Just -- I could see having two groups of patents, say, all together, say six patents and doing it at once, and that would help me figure out how to do the trials.

02:13 MR. ETHERIDGE: Well, right, Your Honor. And we discussed this in the Microsoft case. And we agreed that the buckets or the groupings, if you will, are for Markman purposes only. There's not going to be 12 trials on one patent or one trial on 12 patents. That's for sure. The problem is is until we get to Markman and even afterwards there may be patents that fall out because of 101 issues. There may patents that fall out on IPR issues, and we just had this similar situation up with Judge Payne, and, you know, maybe three or four months out the cases in effect were consolidated for purposes of discovery and things like that, but three or four months out he asked the parties, hey. Tell me how we're going to try these. At that time we had -- and, you know, we came up with -- I think it

ended up being six or seven patents across three trials, but I don't think we have that visibility until -- you know, it's an ongoing process. And so I encourage the Court, let's get our schedule. Let's work toward it and let's see what happens in the Markman. Some things may fall out. There may be some 101 motions that take things out. I'm pretty sure there are going to be IPRs filed, and as the case moves forward, we can see what that trial's going to look like.

THE COURT: Okay.

MR. ROSENTHAL: Your Honor, this is Brian Rosenthal. I couldn't agree more that the -- it's very likely that we're going to have patents dropping out. I expect that some of them will drop out before Markman. But I totally agree with the spirit of what Jim is saying which is that the case is going to change the nature, you know, of the -- and the scope of the case won't really be clear until at least the Markman or sometime thereafter, and so our thinking was only that let's make sure that we have all of the dates leading up to Markman in stone. Let's, you know, work as much as we can to get everything ready so that we can hit the ground running with respect to discovery, but then the setting of the remainder of the schedule seems to make most sense once we come to that point when we have a better sense of what the scope of the case is. That was our only suggestion.

THE COURT: Okay. I think we're back to our Dr. Phil

02:15 moment where everyone's happy. And I think we probably ought to adjourn at this time while we're all feeling good about ourselves and how we've done in the case.

So putting that at risk, is there anything else from the plaintiff?

MR. ROSENTHAL: Not from defendant.

MR. SIEGMUND: Not from the plaintiff, Your Honor.

THE COURT: Okay. Thank you very much. Have a safe day, and I look forward to seeing at least some of you hopefully in the near future. Take care. Bye.

02:40 (Hearing adjourned at 2:40 p.m.)

UNITED STATES DISTRICT COURT )

WESTERN DISTRICT OF TEXAS )

I, Kristie M. Davis, Official Court Reporter for the United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

Certified to by me this 2nd day of October 2020.

*/s/ Kristie M. Davis*

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